IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO.595 OF 2003
IN
SUIT NO.604 OF 1988

1. Chrostopher John,

2. Earnest John & Co. Pvt. Ltd.
having their Registered Office
194, Earnest House, Nariman
Point, Bombay - 400 021 .. Appellants.

V/s.

1. Stany Harry D'Souza
C/o. Plot No.251,
Cleanex Wadala,
Bombay - 400 031.

2. M/s.John Builders Pvt. Ltd.
a company incorporated under
the Companies Act having
their office at 194 Earnest
House, Nariman Point,
Bombay - 400 021 .. Respondents.

Mr.Janak Dwarkadas, Senior counsel with Chirag Balsara, N. Engineer and Abu Jaliwala i/b. Desai & Diwanji for the appellants.

Mr.Prabhakar Naidu for the respondents.

CORAM : R.M. LODHA, &
J.P. DEVADHAR, JJ.

DATED : 3RD SEPTEMBER, 2004.

ORAL JUDGMENT (Per R.M. Lodha, J.) :

. The respondent No.1 before us is the original plaintiff. He filed the suit for specific

performance of the agreement for sale dated October 15, 1980 against the present appellants (for short, 'the defendant Nos.1 and 2') and the respondent No.2 (for short, 'the defendant No.3') on the original side of this court. The said agreement for a consideration of Rs.1,00,000/-, according to the plaintiff, is in respect of the Garage Nos.10,11 and 12 in the building under construction known as Earnest House and situate at Plot No.194, Backbay Reclamation, Block No.3, Nariman Point, Bombay. The part consideration of a sum of Rs.90,000/- was paid in cash and the balance of Rs.10,000/- was payable on delivery of possession. The plaintiff averred that there was an oral agreement between the plaintiff and the first defendant in respect of Garage Nos.4,5 and 6 in the same building being constructed by the defendants for the price of Rs.1,00,000/-. The plaintiff paid a total sum of Rs.90,000/- by cheque leaving balance of Rs.10,000/-. The plaintiff averred that the defendant Nos.1 and 2 were found avoiding performing its obligations under the agreement dated October 15, 1980 as well as oral agreement. According to the plaintiff by inadvertence and bona fide mistake in the letter addressed to the defendant Nos.1 and 2, the plaintiff wrongly stated that towards sale price of garage

Nos.10,11 and 12 the payment was made by cheque while in fact the payment was made in cash. The plaintiff averred that he was always and is ready and willing to pay balance of Rs.10,000/- and to complete the sale but the defendants have been avoiding to complete the obligations under the contract. The plaintiff, thus prayed that the defendants be ordered to specifically perform the agreement for sale dated October 15, 1980 and hand over peaceful and vacant possession of garage Nos.10,11 and 12 to the plaintiff. Alternative prayer for decree in the sum of Rs.12,00,000/- by way of damages and compensation and refund of earnest money along with interest @ 18% was also made.

2. The defendant Nos.1 and 2 in opposition to the plaintiff's claim has filed written statement. The said defendants denied that they agreed to sell the garages Nos.10, 11 and 12 to the plaintiff. According to them, the plaintiff suppressed true facts about the transaction. The facts relating to the transaction were set out in para 2 of the written statement. The defendant Nos.1 and 2 denied that the plaintiff paid to them a sum of Rs.90,000/- in cash as alleged. They denied that it was agreed that the balance of Rs.10,000/- would be paid on delivery of

possession. They denied that the plaintiff was ready and willing to complete the agreement and comply with the obligations under the contract. They set up the defence that the claim of the plaintiff was barred by time.

3. On the basis of the pleadings of the parties, the learned trial Judge has framed the following issues :

1. Whether the Plaintiff proves that agreement for Sale dated 15.10.1980 was executed by the Plaintiff with Defendants and entitled for Specific Performance of Agreement against the Defendants ?

2. Whether the Plaintiff proves that they are ready and willing to perform the Specific Performance by making balance amount on possession being handed over to the Plaintiff by the Defendants ?

3. Whether the Defendants prove that the agreement dated 15.10.1980 is not Specific Performance but it is loan agreement as alleged by the Defendants ?

4. Whether the Defendants prove that claim of the Plaintiff is barred by law of limitation ?

5. Whether the Plaintiff is entitled for damages for non-performance of Contract dated 15.10.1980 ?

6. Whether the Plaintiffs are entitled for permanent injunction against the Defendants?

7. What order ?

4. On June 11, 2003 the matter was fixed before the learned trial Judge for evidence. The plaintiff filed his affidavit in the nature of examination in chief. He was present in the court for cross-examination. However, the learned trial Judge dealt with the question as to who should begin the evidence first and upon perusal of the plaint, the written statement and the documents annexed with the plaint held that the burden has shifted on the defendants and, accordingly, passed order on June 11, 2003; the operative part thereof reads thus :

> "8. In view of this the initial burden of proof lies on the defendants. The fact that the plaintiff tendered his affidavit of evidence cannot bind him because burden of proof is to be decided by the court and therefore the defendants to begin his evidence. Defendants to file affidavit of evidence within two weeks or keep the witnesses ready in court for examination in chief and cross-examination. Matter adjourned for two weeks. No more time will be granted on any count."

5. The order dated June 11, 2003 passed by the learned trial Judge is under challenge in appeal.

6. The learned counsel for the respondent raised preliminary objection about the maintainability of the appeal. He submitted that the impugned order is not a ‘judgment’ within the meaning

of clause 15 of the Letters Patent and, therefore, the appeal was not maintainable. He relied upon the judgment of the supreme court in the case of Shah Babulal Khimji V/s. Jayaben D. Kania & Another [AIR 1981 Supreme Court 1786].

7. In Shah Babulal Khimji the Supreme Court laid down inter-alia the test that whenever the trial Judge decides a controversy which affects valuable rights of the parties, it must be treated to be a 'judgment' within the meaning of the Letters Patent. Every interlocutory order cannot be regarded as a judgment but an order which decides matters of moment or affects vital and valuable rights of the parties and which work serious injustice to the party concerned, though interlocutory order cannot be regarded as a judgment. The impugned order, if tested with the touchstone of the test aforenoted, we find that though interlocutory it affects vital and valuable right of the defendants and if allowed to stand it would work serious injustice and, therefore, amenable to appeal. In a suit for specific performance of contract wherein the plaintiff is required to prove that the agreement of which specific performance is sought is an agreement for sale and that he has been ready and willing to

perform his obligations under the contract, if the defendant is asked to lead evidence first that the agreement in question is not an agreement for sale but a loan agreement, we are afraid it not only vitally, gravely and seriously affects the rights of the defendants but also works serious injustice. How can in a suit for specific performance of contract relating to sale of immovable property, and the denial by the defendant that subject agreement is an agreement for sale, the defendant be asked to lead evidence first without plaintiff having led the evidence in respect of agreement and that he has been ready and willing to perform his obligations under the contract. The burden to prove readiness and willingness is on the plaintiff and it never shifts in the light of Section 16 of the Specific Relief Act. It would be travesty of justice if the initial burden of proof in a suit for specific performance of contract relating to immovable property is placed on the defendant to prove that the subject agreement was not an agreement for sale. There is essential distinction between the burden of proof as a matter of law and pleadings and as a matter of evidence. The burden in the first sense is always constant but the burden in the sense of adducing evidence shifts from time-to-time having regard to the evidence

adduced on the presumption of fact or law raised in favour of one or the other. The burden of proof lies on the person who asserts the affirmative of the issue and, therefore, the burden to prove issue Nos.1 and 2 is on the plaintiff and he has to adduce first on these issues.

8. The observation by the learned trial Judge that the burden shifts on the defendants is apparently erroneous. We are unable to accept the submission of the learned counsel for the respondent that the defendant Nos.1 and 2 could be directed to lead evidence first in a case like this.

9. The procedure adopted by the learned trial Judge is also strange. The plaintiff had already tendered his affidavit in the nature of examination in chief. He was present for cross-examination. Instead permitting the cross-examination of the plaintiff who had already tendered his affidavit of evidence, the learned trial Judge held that the burden shifted on the defendants and the defendants must proceed with the examination-in-chief and cross-examination. We are unable to appreciate the approach of the learned trial Judge. Order 10 Rule 1 and Order 18 Rule 3 pressed into service by the

learned counsel for the respondents hardly help the procedure adopted by the learned trial Judge. In the very nature of the issue Nos.1 and 2 that have been framed and to be tried, we have no hesitation in holding that it is the plaintiff who has to lead his evidence first as the burden to prove the said issues is on the plaintiff.

10. Looking from another angle Section 102 of the Evidence Act provides that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side even. If no evidence was led by either of the parties, the plaintiff's suit for specific performance shall fail. It is for this reason also the burden of proof in the present suit for specific performance is on the plaintiff because if no evidence was led by either side, the suit will fail. If the defendant Nos.1 and 2 do not lead any evidence on the issues burden of which has been cast upon them, the plaintiffs suit for specific performance cannot be decreed. For this reason as well the plaintiff has to lead the evidence first insofar as issue Nos.1 and 2 are concerned before the defendant Nos.1 and 2 can be called upon to lead evidence.

11. From any point of view, we find that the impugned order is unsustainable and has to be set aside.

12. The appeal, thus, succeeds. The order dated June 11, 2003 is set aside.

13. The learned trial Judge shall now proceed with the matter.

14. No costs.

15. Certified copy expedited.

(R.M. LODHA, J.)

(J.P. DEVADHAR, J.)